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IN THE

Supreme Court of the United States

October Term, 1954

No. 184

MAC Q. WILLIAMSON, Attorney General of the State of Oklahoma, et al, *Appellants,*

v.

LEE OPTICAL OF OKLAHOMA, INC., et al

No. 185

LEE OPTICAL OF OKLAHOMA, INC., et al, *Appellants,*

v.

MAC Q. WILLIAMSON, Attorney General of the State of Oklahoma, et al.

On Appeals From the District Court of the United States For the Western District of Oklahoma

BRIEF FOR THE AMERICAN OPTOMETRIC ASSOCIATION, INC. AS AMICUS CURIAE

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IN THE

Supreme Court of the United States

October Term, 1954

No. 184[1]

MAC Q. WILLIAMSON, Attorney General of the State of Oklahoma, et al, *Appellants*,

v.

LEE OPTICAL OF OKLAHOMA, INC., et al.

On Appeals From the District Court of the United States For the Western District of Oklahoma

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BRIEF FOR THE AMERICAN OPTOMETRIC ASSOCIATION, INC. AS AMICUS CURIAE

THE INTEREST OF THE AMERICAN OPTOMETRIC ASSOCIATION, INC.

This brief amicus curiae is submitted on behalf of the American Optometric Association, Inc. with the consent of the parties.

The American Optometric Association, Inc., organized in 1897 and incorporated in 1918 as a non-profit membership corporation under the laws of the State of Ohio, is the

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[1] Together with No. 185, *Lee Optical of Oklahoma, Inc., et al.* v. *Mac Q. Williamson, Attorney General of the State of Oklahoma, et al.*

national organization representing the profession of optometry, having a membership of approximately 70% of all eligible practicing optometrists in the country.

The optometrist is the only practitioner especially and exclusively trained to examine and refract the eyes of his patient for defects in vision. The practice of optometry has been defined to be the science and art devoted to the examination of the eyes, the analysis of the ocular functions and the employment of preventive and corrective methods and agents of an optical and photic character for the relief of visual and ocular abnormalities. The profession of optometry, as it has grown and as it is now constituted, is a single, complete and unified service, consisting not only of the examination and refraction of the eyes, but also of the prescribing and furnishing of eyeglasses or vision training, or both, as may be found necessary by the optometrist.[2] The Supreme Court of Michigan has pointed out that:

> optometry has become a real science devoted to measurement, accomodation, and refractory powers of the eye without the use of drugs, thus superseding obsolete and mechanical methods of fitting eyeglasses. It has become one of the important professions, and for the preparation of its proper practice courses in op-

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[2] The ophthalmologist is a physician who has taken post graduate work in the eye and has passed examinations given by the American Board of Ophthalmology. He is specially trained to perform eye surgery and to treat diseases of the eye. He is accredited and is a diplomate in ophthalmology.

The occulist is also a physician, who, on his own, has decided to specialize in the eye. He usually practices, in addition, the specialties of the ear, nose, and throat. For the purposes of this case, no distinctions will be drawn between the ophthalmologist and the oculist. The ophthalmologist and the oculist usually write prescriptions for eyeglasses; they do not ordinarily fill the prescriptions or provide the glasses themselves.

The optician, sometimes called a dispensing optician or an ophthalmic dispenser, is a mechanic who fills the prescriptions for eyeglasses written by the ophthalmologist or oculist. The optician is not qualified to examine the eye or to write prescriptions for eyeglasses.

> tometry, physics, physiology, pathological conditions of the eye, the proper use of the retinascope, ophthalmometer, ophthalmoscope, refractor, prisms, lenses, etc., are given as part of the curriculum in many of our largest universities as well as colleges specializing in optometry. The legislatures throughout the entire country have recognized that the proper practice of this profession is of the most vital importance to the public, and have made due provisions, not only for the licensing of optometrists after proper examination, but for regulating the proper practice of the profession. (*Seifert* v. *Buhl Optical Co.*, 276 Mich. 692, 697-98, 268 N.W. 784, 786).[3]

In the past fifty years, the profession of optometry has kept pace with the onrush of progress in other fields. In this nuclear age of supersonic speeds, the requirements of vision and the practice of the profession are as different as the jet plane is from the horse and buggy. For example, the enormous increase in recent years in the number of operators of motor vehicles on the public highways—dangerous instrumentalities in the hands of those with poor vision—suggests the existence of an evergrowing need for more effective use of the police power in an area where appropriate legislation not only is of direct benefit to the many individuals involved, but also promotes the public safety. And, for example, tolerances in a number of industries are measured with far greater accuracy than was formerly the case, making greater demands on human vision. It is not necessary to list other facts to prove the vital public concern in the field of visual care.

From its inception, the purposes of the American Optometric Association, Inc. were, and still are, to protect and conserve the vision of the public; to render the best possible service to the vision of the public in the light of discovery and invention; to elevate the standards and practice of the profession; and to protect the public health,

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[3] The court below, at one point in its opinion (R. 37, n. 3), inadvertently referred to the optometrist as a "quasi-professional." But see R. 41.

safety and welfare from the danger and injury caused by the untrained, the unqualified, the unethical, and the unprofessional.

The Association has been, and continues to be, interested in legislation and litigation affecting the practice of the profession of optometry and the field of visual care. It constantly guides and counsels toward greater professional status, attainment, and achievement, through better education and through the enactment of salutary legislation for the public and the profession.

The American Optometric Association, Inc. has a vital interest in the matters before the Court in this case. The decision of the court below, holding invalid portions of the Oklahoma law relating to visual care, is, we believe, a long step backward. The decision, if affirmed by this Court, would, as we point out in detail, *infra*, invalidate similar provisions in the statutes of many other states, and would cast doubt on the validity of other related provisions in the laws of still other states. Also the authority of many of the decisions of some of the highest state courts would be put in question, and, in our view, the chaotic conditions in the field of visual care that would result could only mean substantial retrogression in this field with resulting damage to the health and welfare of the people of the country, a result which the American Optometric Association, Inc., is pledged to prevent, so far as it is able to do so. The Association's interest in this case is real.

STATUTE INVOLVED

The pertinent provisions of Oklahoma Enrolled House Bill No. 953 (Okla. Stats. Ann., Title 59, §§ 941-947) are set forth in the Appendix, *infra*, pp. 56-58.

SUMMARY OF ARGUMENT

The American Optometric Association, Inc., contends that all of the provisions of the Oklahoma visual care legislation here involved are constitutional. The legislation

was enacted by the Oklahoma legislature pursuant to the State's police power in the interest of the public health and welfare. In holding certain provisions of this legislation invalid, the court below failed to apply the well-settled applicable principles that such legislation is presumed to be valid and cannot be annulled unless it is arbitrary and unreasonable and without any rational basis. If the court below had not improperly substituted its judgment for that of the Oklahoma legislature as to the wisdom of the legislation, it would have found no provision of the Oklahoma law in violation of the federal constitution.

I

The court below erred in holding invalid, under the due process clause, those portions of section 2 of the Oklahoma Act which prohibited, except upon written prescription of a qualified Oklahoma eye examiner, (1) the fitting, adjusting, or adapting of lenses, frames, etc. to the face of a person, and (2) the duplication of lenses or other optical appliances. The validity of those provisions of section 2 should have been sustained on the authority of this Court's decision in *Roschen* v. *Ward*, 279 U. S. 337, which upheld a New York statute making it unlawful to sell eyeglasses at retail in any store unless a licensed physician or optometrist was in charge of and in personal attendance at the place where the glasses were offered for sale. The statute was applied in the *Roschen* case to the sale of ready-to-wear store glasses. The court below did not distinguish *Roschen;* instead it pointed out that the situation sought to be controlled in that case and in the instant case were identical insofar as effect on the public health was concerned. The court's failure to find the *Rochen* decision controlling here is incomprehensible.

Moreover, apart from the authority of the *Roschen* decision, the court below should have sustained the validity of Section 2 on principle, because of its close relationship

to the public health and welfare. When lenses are duplicated or glasses or frames are fitted to one's face, the really important consideration is whether the glasses are proper and suitable for the wearer. No matter how expert an optician may be in adjusting or fitting glasses or in duplicating lenses, he is not qualified to determine whether a particular pair of glasses is appropriate for the wearer. Only a prescription from an optometrist or a physician can give the optician that information, and the purpose and effect of the section are to make sure that such information is available before glasses are adjusted or fitted or lenses duplicated. Section 2 in no sense legislates opticians out of a trade, or transfers business elsewhere. Opticians are still free to ply their trade, but only in the public interest pursuant to a prescription of a professional optometrist or physician.

The reasonableness of the requirements of section 2 is evidenced by the facts that seventeen other states have enacted legislation specifically prohibiting the duplication of ophthalmic lenses without a prescription from a licensed ophthalmologist or optometrist and that twelve other states include in their definition of the profession of optometry the adjusting, fitting, etc. of lenses and other optical appliances and provide that this cannot be done by one not an optometrist or physician, except on prescription.

The court below erred also when it held section 2 invalid on the further ground that it violated the equal protection clause of the Fourteenth Amendment because of an exemption in favor of sellers of ready-to-wear glasses sold as merchandise (as distinguished from prescription glasses). A state need not strike at all evils at once or in the same way and it is for the legislature, not the courts, to determine which evils the law should protect against. The reasonable basis for the judgment of the Oklahoma legislature is evidenced by the fact that the legislation of thirty-nine states and the District of Columbia contains similar exemptions. While such exemptions are valid,

the American Optometric Association, Inc., as a matter of policy, would prefer that such exemptions be eliminated from state laws and that the sale of ready-to-wear glasses be regulated also.

II

The advertising restrictions contained in section 3 of the Oklahoma act, making it illegal to solicit the sale of spectacles, eyeglasses, lenses, frames, mountings etc. are clearly constitutional and do not violate the due process clause of the Fourteenth Amendment. In the field of public health, the state is concerned with providing safeguards against deception of the public and against practices that might tend to demoralize the health professions by forcing members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. See *Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608. The highest courts of the states which have considered the problem have upheld advertising restrictions in the field of visual care. And for such legislation to be effective it must necessarily include within its scope the merchant optician as well as the professional optometrist and physician. The court below invalidated the advertising limitations only insofar as they related to the sale of "frames, mountings, * * * or any other optical appliances," being of the opinion, apparently, that there is some significant difference, with respect to effect on the public health, between advertising frames as distinguished from eyeglasses. But there is no such distinction. Frames are purchased to be worn with lenses as complete eyeglasses. That is the only purpose of frames. The legislation of many states which limits advertising includes frames, mountings and other optical appliances within its scope.

The advertising restrictions of section 3 do not violate the interstate commerce clause because they prohibit advertising by radio, newspapers and other media

of interstate communication. The regulation is essentially a local regulation; it does not discriminate against interstate commerce, and any effect it might have on such commerce is purely incidental and in violation of no known national regulations or policies. The decisions of this Court make it clear that section 3 does not violate the commerce clause.

III

The court below erred in holding invalid that portion of the Oklahoma Act which provides that "no person, firm, or corporation engaged in the business of retailing merchandise to the general public shall rent space, sublease departments, or otherwise permit any person purporting to do eye examination or visual care to occupy space in such retail store." The restriction is not "arbitrary and oppressive" as the court below held. Rather, it is most reasonable and is closely related to the public health and welfare. The practice of medicine or optometry by commercial interests is a conceded evil which the state can prohibit. The restriction of section 4 closes one loophole in efforts to evade the concededly valid prohibition against corporate practice and, in addition, reduces the incentive on the part of mercantile interests to enter into illicit business arrangements. Moreover, the state has an interest in seeing that the health professions are not practiced in retail stores, in order to protect against incompetence and lack of ethics in the professional service.

ARGUMENT

The court below, a three-judge federal district court specially constituted pursuant to the provisions of 28 U. S. C. 2281, held that certain provisions of Oklahoma Enrolled House Bill No. 953, relating to visual care (Okla. Stats. Ann., Title 59, §§ 941-947), which were enacted pursuant to the police power of the State of Oklahoma, violated the Constitution of the United States. It held

invalid under the due process and equal protection clauses of the Fourteenth Amendment those portions of section 2 of the Oklahoma Act which make it unlawful for any person not a licensed optometrist or ophthalmologist, "To fit, adjust, adapt or to in any manner apply lenses, frames, prisms, or any other optical appliances to the face of a person * * *" or "to duplicate or attempt to duplicate or to place or replace into the frames, any lenses or other optical appliances which have been prescribed, fitted or adjusted for visual correction, or which are intended to aid human vision * * *" except upon written prescriptive authority of any Oklahoma licensed ophthalmologist or optometrist. R. 44-53. It also held that that portion of section 3 of the Oklahoma Act which makes it unlawful "to solicit the sale of * * * frames, mountings * * * or any other optical appliances" violated the due process clause (R. 53-58) and that that part of section 4 which provides that "No person, firm, or corporation engaged in the business of retailing merchandise to the general public shall rent space, sub-lease departments, or otherwise permit any person purporting to do eye examination or visual care to occupy space in such retail store" violated the due process clause and constituted "an arbitrary interference with the right of contract." R. 58-60. Judge Murrah dissented from these last two holdings. R. 62-68. The correctness of the court's holdings is now before this Court for consideration in the appeal in No. 184. R. 31-33. In addition, in No. 185, plaintiffs allege that the court below erred in limiting its decision with respect to section 3 to "frames, mountings * * * or any other optical appliances" and should have also held invalid those additional provisions of section 3 which make it unlawful to solicit the sale of "spectacles, eyeglasses, lenses, * * * (or) prisms."[4] R. 34-35.

[4] Inasmuch as there are two appeals and in order to avoid confusion, we shall continue to refer to the plaintiffs and defendants below as plaintiffs and defendants herein.

The American Optometric Association contends that all of these contested provisions of the Oklahoma Act are clearly authorized under the police power of the State of Oklahoma, that they offend no provisions of the federal constitution, and that, accordingly, the court below should have dismissed the complaint.

The legislation here involved was concededly enacted by the Legislature of the State of Oklahoma pursuant to the police power of the State. It had as its purpose the furtherance of "the public policy of the State of Oklahoma that the citizens of Oklahoma shall receive the best possible visual care" (Section 1 of the Oklahoma Act), a concededly legitimate and valid concern of the State of Oklahoma. The court below held, nonetheless, that the provisions of Sections 2, 3 and 4 of the Oklahoma Act, already referred to, were invalid and beyond the constitutional authority of the State to enact, and the principal question, in our opinion, that this case presents to this Court concerns the practical application of the well-settled doctrines relating to the permissible scope of judicial scrutiny, under the federal constitution, of state legislation so enacted for the public good. We say that the case involves the practical application of the doctrines, because we do not think that the doctrines themselves are, or can be, in question or dispute. The difficulty is that the court below merely paid lip service to the doctrines it stated; it lost its way, we believe, when it undertook to apply them in this case.

"It is recognized, without citation of authority," the court below observed, "that all legislative enactments are accompanied by a presumption of constitutionality; and, that the court must not by decision invalidate an enactment merely because in the court's opinion the legislature acted unwisely. Likewise, where the statute touches upon the public health and welfare, the statute cannot be deemed unconstitutional class legislation, even though a specific class of persons or businesses is singled out, where

the legislation in its impact is free of caprice and discrimination and is rationally related to the public good. A court can only annul legislative action where it appears certain that the attempted exercise of police power is arbitrary, unreasonable or discriminatory." R. 39-40. If the court below had actually applied the principles which it stated, it would not have fallen into the grievous error of striking these provisions of the Oklahoma law as unconstitutional.[5] We suggest that the court below, although it stated the bare legal formula accurately, did not fully appreciate its significance in application and adopted a "due process philosophy that has been deliberately discarded" by this Court. *Lincoln Federal Labor Union* v. *Northwestern I. & M. Co.*, 335 U. S. 525, 537.

This is evidenced, in our view, by the court's reliance on the 1928 decision of this Court in *Liggett Company* v. *Baldrige*, 278 U. S. 105. The *Liggett* decision, it will be recalled, held invalid, over the dissent of Justices Holmes and Brandeis, a Pennsylvania statute which required owners of drug stores to be licenses pharmacists, and, in the case of corporations or other associations, required that all members or partners thereof similarly be licensed pharmacists. The statute was held to contravene the due process clause of the 14th Amendment because it was thought to be unreasonable and arbitrary, and its requirements were thought to bear no reasonable relationship to the public health, such relationship, if any, resting on mere conjecture.[6] The court below relied on the *Liggett*

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[5] "Even where the social undesirability of a law may be convincingly urged, invalidation of a law by a court debilitates popular democratic government. * * * Such an assertion of judicial power deflects responsibility from those on whom in a democratic society it ultimately rests—the people." Mr. Justice Frankfurter, concurring in *Lincoln Federal Labor Union* v. *Northwestern I. & M. Co.*, 335 U. S. at 553.

[6] Mr. Justice Sutherland reviewed the various other statutory provisions enacted by Pennsylvania to protect the public in the purchase of drugs and medicines and concluded that "In the light of the various requirements of the Pennsylvania statutes, it is

decision for the proposition that the effect of legislation such as here involved must bear a reasonable relation to the purpose to be accomplished (R. 43) and must not constitute an arbitrary invasion of a person's property rights. (R. 50-51). But the authority of the *Liggett* case is extremely doubtful today. In *Daniel* v. *Family Security Life Insurance Co.*, 336 U. S. 220, decided in 1949, this Court was concerned with the validity of a South Carolina statute which prohibited life insurance companies and their agents from operating an undertaking business and prohibited undertakers from serving as agents for life insurance companies. It was urged upon the Court that the statute was arbitrary and unreasonable and violated the due process and equal protection clauses of the Fourteenth Amendment. The Court, however, recognized the plea as an argument for invalidity on the ground that the Court should disagree with the desirability of the legislation. The Court stated however: "We are not equipped to decide desirability, and a court cannot eliminate measures which do not happen to suit its tastes if it seeks to maintain a democratic system. The forum for the correction of ill-considered legislation is a responsive legislature." 336 U. S. at 224. The Court was unable to say that South Carolina was "not entitled to call the funeral insurance business an evil"; nor could it say that the statute had no relation to the elimination of those evils. And there its "inquiry must stop." (Ibid.) The

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made clear if it were otherwise doubtful, that mere stock ownership in a corporation, owning and operating a drug store, can have no real or substantial relation to the public health; and that the act in question creates an unreasonable and unnecessary restriction upon private business." 278 U. S. at 113. Mr. Justice Holmes, in his dissent, pointed out that a licensed pharmacist owner would more likely observe the business "with an intelligent eye," and that the Constitution does not require that preventive legislation "work a perfect cure," it being sufficient if it has a "manifest tendency to cure or at least to make the evil less," and he concluded "that the police power as that term has been defined and explained clearly extends to a law like this, whatever I may think of its wisdom." 278 U. S. at 114-115.

Liggett decision was urged upon the Court as authority for invalidating the South Carolina statute, but the contention was given short shrift. The Court stated (336 U. S. at 225):

> This rationale did not find expression in Louis K. Liggett Co. v. Baldridge, 278 U. S. 105, on which respondents rely. According to the majority in Liggett, "a state cannot, 'under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.'" 278 U. S. at 113. But a pronounced shift of emphasis since the Liggett Case has deprived the words "unreasonable" and "arbitrary" of the content for which respondents contend. See Lincoln Federal Labor Union v. Northwestern Iron & Metal Co. 335 U. S. 525, where the cases are reviewed.

It is unnecessary here to restate the review of the cases set forth in the *Lincoln Federal Labor Union* decision, *supra*, at 534-537. It is sufficient to state that the development has been such as to give real meaning to the doctrine of judicial abstention, and to make the words that the court below repeated in that regard become more than empty formulas and really mean what they say. As the Court in the *Lincoln Federal Labor Union* case stated, "the due process clause is no longer to be so broadly construed that the Congress and State legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare." 335 U. S. at 536-537. See also the concurring opinion of Mr. Justice Frankfurter, 335 U. S. at 542-557; *Railway Express Agency* v. *New York*, 336 U. S. 106. We think it is clear that if the court below had approached this case with the judicial attitude to which legislation of this character is entitled, and had not lifted statutory provisions from their statutory context in order to find them invalid, and had actually applied to the statutory provisions in this case the principles

of law which it espoused and, finally, had not decided this case from the point of view of a 1928 decision, the soundness of which has since been questioned by this Court, the provisions of the Oklahoma act here in controversy would have been held to offend no provision of the federal constitution.

I

The Challenged Portions of Section 2 of the Oklahoma Act Do Not Offend Any Provision of the Federal Constitution

Due Process—The court below, recognizing that "many aspects of the field of visual care are of sufficient public interest to warrant the operation of police power authority" and that "many regulatory measures directed toward protecting the public in regard to eye care have been judicially sanctioned," (R. 41)[7] conceded that "Clearly that phase of visual care which deals with the actual examination of the eyes (whether for pathology or refraction) together with promotional advertising which brings direct mercantile pressure upon the public to submit to exami-

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[7] The court cited *Roschen* v. *Ward*, 279 U. S. 337; *Commonwealth* v. *S. S. Kresge Company*, 267 Mass. 145, 166 N. E. 558; *Ritholz* v. *Commonwealth*, 184 Va. 339, 35 S. E. (2d) 210. There are, of course, many other state court decisions which relate to various aspects of state regulation of the field of visual care. The following decisions are illustrative. *Ritholz* v. *Arkansas State Board*, 206 Ark. 671, 117 S. W. 410; *State* v. *Kindy Optical Co.*, 216 Iowa 1157, 248 N. W. 332; *State ex rel. Beck* v. *Goldman Jewelry Co.*, 142 Kan. 881, 51 P. (2d) 995; *State* v. *Rones*, 223 La. 839, 67 So. (2d) 99; *Commonwealth* v. *Ferris*, 305 Mass. 233, 25 N. E. (2d) 378; *Kindy Opticians, Inc.* v. *Michigan State Board of Examiners*, 291 Mich. 152, 289 N. W. 112; *Seifert* v. *Buhl Optical Co.*, 276 Mich. 692, 268 N. W. 784; *State* v. *Goodman*, 206 Minn. 203, 288 N. W. 157; *Sears Roebuck & Co.* v. *State Board of Optometry*, 213 Miss. 710, 57 So. (2d) 726; *N.J. State Board of Optometrists* v. *S. S. Kresge Co.*, 113 N. J. L. 287, 174 A. 353; *City of Springfield* v. *Hurst*, 144 Ohio St. 49, 56 N. E. (2d) 185; *Rowe* v. *Standard Drug Co.*, 132 Ohio St. 629, 9 N. E. (2d) 609; *Neill* v. *Gimbel Bros., Inc.*, 330 Pa. 213, 199 A. 178; *State ex rel. Loser* v. *National Optical Stores Co.*, 189 Tenn. 433, 225 S. W. (2d) 263; see also *Palmer* v. *Smith*, 229 N. C. 612, 51 S. E. (2d) 8.

nations and to purchase spectacles, is subject to legislative control." R. 43.

The court, nevertheless, held invalid the first portion of section 2 of the Oklahoma Act, prohibiting, except upon written prescription of a qualified Oklahoma eye examiner, the fitting, adjusting, adapting, or applying of lenses, frames, etc. to the face of a person, on the sole ground that that portion had the effect of making it unlawful for either a dispensing or laboratory optician, without a prescription, to take old lenses and place them in new frames and then fit the completed spectacles to the face of the eyeglass wearer, thereby preventing eyeglass wearers from exchanging their frames for more modern ones without first visiting an ophthalmologist or optometrist, and also, in the court's view, diverting profitable business from opticians. Since many written prescriptions usually contain no directive data in regard to the fitting of spectacles to the face, the court was satisfied "that the mere fitting of frames to the face, where the old lenses are available, is in reality only an incident to what fundamentally is a merchandising transaction, that is, the sale of a pair of frames; and, in any event, the knowledge necessary to perform these services is strictly artisan in character and can skillfully and accurately be performed without the professional knowledge and training essential to qualify as a licensed optometrist or ophthalmologist". R. 45. These services, in the court's view, bear "no real or rational relation to the actual vision of the public." They do not affect *prospective* eyeglass wearers "inasmuch as a person seeking this particular service must already possess a pair of eyeglasses," and *present* wearers of eyeglasses are not imperiled inasmuch as "such wearers have previously submitted to examinations by professional men at the time the original pairs of spectacles were obtained." The legislature could not, therefore, under the guise that such control is reasonably or rationally related to the health and welfare of

the people, "control these specific functions, and in effect deprive opticians of their right to pursue a lawful calling." R. 46-47.[8]

For substantially the same reasons, the court struck down the second portion of section 2 of the Oklahoma Act prohibiting the duplication of existing lenses or other optical appliances without a prescription from a licensed optometrist or ophthalmologist. The court pointed out that by use of a lensometer, a qualified optician, without the aid of a written prescription, can accurately duplicate an original pair of glasses, a process which it felt was strictly artisan and mechanical, requiring no professional skill. This being so, the court was of the opinion that it was "absolutely unnecessary to delegate to professional men the control of and responsibility for the just-mentioned artisan tasks, where the opticians, as a group, possess adequate skill to fully protect the vision of the public in accurately duplicating existing lenses" (R. 48), and concluded that the requirement of a prescription for duplication of lenses bore no real and substantial relation to the end sought, which was better vision, and was, consequently, unconstitutional.

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[8] It appears from the foregoing that the court's holding of invalidity was limited to the one situation where an *existing* eyeglass wearer who seeks to change his frames cannot do so without a prescription. But the court completely disregarded the much more important application of the provision restricting the fitting, adapting, adjusting or applying of lenses, frames, prisms, etc., without a prescription, to the face of a person who does not already wear eyeglasses. This, in effect, prevents the illegal practice of optometry. Yet the court did not even seem to appreciate that this is what the provision did primarily. And although the court stated nothing in its opinion that even suggests the invalidity of this provision in this latter application, it nevertheless struck it down without any limitation or qualification. (R. 27-28). It seems to us that if the court had been aware of the wide range of undoubtedly constitutional application of the provision, it would not have picked out the one particular application of the statute which it thought transgressed constitutional limitations and then held it invalid without any qualifications of any kind.

This holding of the court below with respect to section 2 is clearly unsound. The provisions of section 2 of the Oklahoma Act are part of a comprehensive legislative scheme designed to carry out the public policy of Oklahoma that the citizens of Oklahoma "shall receive the best possible visual care" and that "no unqualified person shall be permitted to visually correct for compensation the eyes of another." (Sec. 1 of the Oklahoma Act). The provisions of section 2 are directly related to the accomplishment of those legitimate purposes, and the state was acting within its constitutional authority when it included them in its legislation.

Just as a state, under its police power, may regulate the practice of dentistry (*Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608; *Graves* v. *Minnesota*, 272 U. S. 425; *Douglas* v. *Noble*, 261 U. S. 165; *Dr. Bloom Dentist, Inc.* v. *Cruise*, 259 N.Y. 358, 182 N.E. 16, appeal dismissed, 283 U. S. 588; *State Board of Dental Examiners* v. *Miller*, 90 Colo. 193, 8 P. (2d) 699, appeal dismissed 287 U.S. 563) and the practice of medicine (*Watson* v. *Maryland*, 218 U.S. 173; *Dent* v. *West Virginia*, 129 U.S. 114; see *Hayman* v. *Galveston*, 273 U.S. 414; *Crane* v. *Johnson*, 242 U. S. 339) so too, may a state under its police power regulate the field of visual care. *Roschen* v. *Ward*, 279 U. S. 337, affirming *Roschen* v. *Ottinger*, 29 F. (2d) 762 (S.D.N.Y.); *McNaughton* v. *Johnson*, 242 U. S. 344; *Ritholz* v. *Indiana State Board*, 45 F. Supp. 423 (N.D. Ind.); *Klein* v. *Dept. of Registration and Education*, 412 Ill. 75, 105 N.E. (2d) 758, cert. den. 344 U. S. 855. While it is unnecessary here to set out in detail all the variety of legitimate state regulations in this field, it should be noted generally that a state, among other things, may establish qualifications for the practice of optometry and limit the practice to those having licenses therefor. *McNaughton* v. *Johnson*, 242 U. S. 344; *Klein* v. *Dept of Registration and Education*, 412 Ill. 75, 105 N.E. (2d) 758, cert den. 344 U. S. 855; *Sears Roebuck Co.*

v. *State Board of Optometry*, 213 Miss. 710, 57 So. (2d) 726. It can prevent corporations from practicing optometry and performing optometric services (*State* v. *Kindy Optical Co.*, 216 Iowa 1157, 248 N.W. 332; *State ex rel Beck* v. *Goldman Jewlry Co.*, 142 Kan. 881, 51 P. (2d) 995; *Rowe* v. *Standard Drug Co.*, 132 Ohio St. 629, 9 N.E. (2d) 609; *Neill* v. *Gimbel Bros., Inc.*, 330 Pa. 213, 199 A. 178; *Ritholz* v. *Commonwealth*, 184 Va. 339, 35 S.E. (2d) 210); it can prevent laymen from employing licensed optometrists to perform such services (*Ritholz* v. *Arkansas State Board*, 206 Ark. 671, 117 S.W. 410); it can regulate the advertising of such services and of the sale of eyeglasses (*State* v. *Rones*, 223 La. 839, 67 So. (2d) 99; *Commonwealth* v. *Ferris*, 305 Mass. 233, 25 N.E. (2d) 378; *Seifert* v. *Buhl Optical Co.*, 276 Mich. 692, 268 N.W. 784; *City of Springfield* v. *Hurst*, 144 Ohio St. 49, 56 N.E. (2d) 185; *Ritholz* v. *Commonwealth*, *supra*); and it can limit the sale of eyeglasses so that only certain qualified and licensed persons may be in charge of the sale. *Roschen* v. *Ward*, 279 U.S. 337; *Commonwealth* v. *S. S. Kresge Co.*, 267 Mass. 145, 166 N.E. 558; *City of Springfield* v. *Hurst*, *supra*. See also *N. J. State Board of Optometrists* v. *S. S. Kresge Co.*, 113 N.J.L. 287, 174 A. 353. *Abelson's Inc.* v. *N. J. State Board of Optometrists*, 5 N.J. 412, 75 Atl.(2d) 867.

The court below apparently did not dispute the soundness of any of the foregoing principles or decisions. Instead, as we have stated, it found none of them applicable and held the provisions of section 2 of the Oklahoma Act here involved to be beyond the police power of the state because, in the court's view, they in effect regulated an artisan and commercial, rather than a professional, service which could be performed by an artisan—the optician—equally as well as by a professional, with the consequence that they bore no reasonable relation to the public health and welfare.

It would seem, in our view, that such a conclusion was foreclosed by this Court's decision in the leading case of

Roschen v. *Ward*, 279 U. S. 337, a decision which the court below referred to only incidentally in passing in a footnote. R. 41, n. 8. The *Roschen* decision upheld the validity of a statute of the State of New York which made it unlawful to sell at retail in any store or established place of business "any spectacles, eyeglasses, or lenses for the correction of vision" unless a duly licensed physician or optometrist was in charge of and in personal attendance at the place in the store where the glasses were offered for sale. The complainants in *Roschen* were selling only ordinary store spectacles with convex-spherical lenses which merely magnify and which, it was contended, could do no harm. The customers selected the glasses by themselves without examination and paid relatively small sums for them. It was also contended that the cost of employing a licensed optometrist or physician would make the business impossible and that, further, the statutory requirement was unreasonable in the common case of eyes only grown weaker because of age. These contentions were given short shrift, as was the contention that the statute did not require the optometrist actually to make an eye examination. Mr. Justice Holmes stated (279 U. S. at 339-340):

> When the statute requires a physician or optometrist to be in charge of the place of sale and in personal attendance at it, obviously it means in charge of it by reason of, and in the exercise of, his professional capacity. If we assume that an examination of the eye is not required in every case, it plainly is the duty of the specialist to make up his mind whether one is necessary, and, if he thinks it necessary, to make it. * * * Moreover, as pointed out below, wherever the requirements of the act stop, there can be no doubt that the presence and superintendence of the specialist tend to diminish an evil. A statute is not invalid under the Constitution because it might have gone farther than it did, or because it may not succeed in bringing about the result that it tends to produce.

> Of course we cannot suppose the act to have been passed for sinister motives. We will assume that there are strong reasons against interference with the business as now done; but it is obvious that much good would be accomplished if eyes were examined in a great many cases where hitherto they have not been, and the balancing of the considerations of advantage and disadvantage is for the legislature, not for the courts. We cannot say, as the complainants would have us say, that the supposed benefits are a cloak for establishing a monopoly and a pretense.[9]

The business of selling plain store glasses, which was foreclosed in the *Roschen* case unless the sale was in charge of a registered optometrist or physician, is certainly no

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[9] In the District Court in the *Roschen* case, Judge Augustus N. Hand stated: "To render an optometrist available wherever eyeglasses are sold is certainly a long step toward correcting existing evils. * * * It seems to us that the inevitable tendency would be for customers to consult him, and for a reputable optometrist to furnish assistance and advice as to their needs. If the effect of the new requirement should finally be to render the sale of a standardized product unprofitable, so that the customers in the end would not purchase it, but would have their eyes carefully tested and their glasses made according to special prescriptions, it cannot be said the result might not on the whole be desirable. At any rate, whatever the result to the business of selling a standardized product, the correction of certain manifest evils was within the legislative power, and the means adopted seems to have been reasonably calculated to promote the public health and safety. * * *

"The New York Legislature was not obliged, if it legislated at all, to require an examination of the customer by a licensed optometrist before permitting a sale of eyeglasses to him. Doubtless it could have done this. But it might adopt a halfway measure, safeguarding him by in effect placing sales in charge of a man of scientific training, and rendering the services of the latter naturally available. This it did, and this was, we think, constitutional." 29 F. (2d) 762, 764.

In regard to the possible application of the statute to sales of eyeglasses other than mere magnifying glasses, Judge Hand observed: "Moreover, the complaints do not show that a supervision of sales of spectacles by optometrists, who can more accurately fit a customer than he can fit himself, and who will be in a position to inform him as to eye troubles which cannot be remedied by magnifying glasses, is not a step in the public interest." *Id.* at 765.

less a mercantile transaction and no more a professional service rationally related to the public health and welfare than the services here sought to be foreclosed by the State of Oklahoma, which involve the actual fitting, adapting, and adjusting of lenses, frames and other optical appliances to the face of a person and the duplication of prescription lenses specially made to correct the errors in vision of a particular person. Indeed, the validity of section 2 of the Oklahoma Act follows, *a fortiori*, from the decision of this Court in the *Roschen* case (see *Commonwealth* v. *Ferris*, 305 Mass. 233, 237, 25 N. E. (2d) 378, 381; *City of Springfield* v. *Hurst*, 144 Ohio St. 49, 54, 56 N. E. (2d) 185, 187), and why the *Roschen* case was not held to be controlling here is absolutely beyond comprehension.

As a matter of fact, the court's opinion itself would seem to require such a holding, and its failure to so hold would seem to constitute a disregard for the authority of decisions of this Court. As we have already pointed out, the court was not unaware of the *Roschen* decision, having cited it for the proposition that "many regulatory measures toward protecting the public in regard to eye care have been judicially sanctioned." R. 41, n. 8. Nowhere in its opinion did the court attempt to distinguish *Roschen;* instead it pointed out that the situations sought to be regulated by section 2 of the Oklahoma Act and the legislation in the *Roschen* case were identical insofar as their relationship to the public health and welfare was concerned. As we have already noted, the court held section 2 invalid, not only on the ground that it violated the due process clause, but also because it violated the equal protection clause of the Fourteenth Amendment (a matter which we will discuss more fully hereinafter). The court based its holding on the equal protection issue on the fact that the act exempted sellers of ready-to-wear glasses from control. This was the class covered by the *Roschen* case. In order to find a denial of equal protec-

tion, the court pointed out (R. 51) that sellers of ready-to-wear glasses "from the viewpoint of public health and welfare, lie within the identical class and circumstance occupied by 'fitters and sellers of frames' and 'duplicators of lenses and entire spectacles.'" The court continued (R. 52):

> * * * Persons who sell frames (incidentally adapting and fitting the completed spectacles to the face), persons who duplicate original eyeglasses and market the dulplicated spectacles, and persons who sell ready-to-wear glasses are identically situated; that is, all are sellers of merchandise which is not immediately connected with or supervised by a professional eye examiner. Yet the public health and welfare is touched in the same manner and degree by each of these groups inasmuch as the possible result is exactly the same; people may wear spectacles which are not best suited for their eyes.

Having so concluded, the court should have sustained the validity of section 2 under the due process clause on the authority of the *Roschen* case, without more. Its failure to so hold, as we have already indicated, seems incomprehensible. It could be that the court, when it considered the equal protection issue, forgot that this Court had decided the *Roschen* case, and did not realize, therefore, that its own holding in this case on the due process issue was in direct conflict with the *Roschen* decision.

Moreover, and quite apart from the authority of this Court's decision in *Roschen*, the court below erred on principle when it concluded that the regulatory features of section 2 of the Oklahoma Act here under consideration bore no rational relation to the public health and welfare of the people of the State of Oklahoma.

We submit that all of the factors which apparently led the court below to its conclusion are irrelevant and beside the point. It is entirely immaterial that the fitting of frames or the duplicating of lenses may be considered artisan tasks which a qualified optician can perform satis-

factorily. It is also immaterial that licensed optometrists and ophthalmologists often use the lensometer for duplication of lenses just as an optician does. Further, it is entirely immaterial that prescriptions of optometrists and ophthalmologists often do not contain any directive data in regard to the manner in which the spectacles are to be fitted to the face of the wearer. The real question in this case is not whether the optician can do these tasks. Although the record shows (R. 99, 106, 107, 138-139, 142, 235, 236-237, 250-251, 258) that, in fact, a pair of eyeglasses can be more accurately duplicated from a prescription than by the use of a lensometer and that in some instances a prescription is absolutely essential, the really important consideration is whether a particular pair of glasses is the proper pair for a particular individual to wear in order to correct the particular defects in his vision or to alleviate some eye condition or eye ailment that he may have. This judgment an optician is not qualified to make, no matter how expert a mechanic or technician he may be. Only a prescription from a licensed professional optometrist or ophthalmologist can tell him that a particular pair of glasses is suitable for a particular individual. Even if it is conceded that an optician is qualified to take old lenses, place them in new frames, and then fit the completed glasses to the face of the wearer, the optician does not and cannot know whether the lenses are appropriate for the wearer. And the same is true, of course, in the matter of duplication of existing lenses. Even if it is conceded that a qualified optician can duplicate an existing lens, there is no contention that he is qualified to determine whether the lens is appropriate for the particular wearer. Only the optometrist or ophthalmologist, whose prescription the statute requires, can determine that. The court's suggestion (R. 46) that by striking down the statutory requirement "*present* wearers of eyeglasses are not imperiled inasmuch as such wearers have previously submitted to examinations by professional

men at the time the original pairs of spectacles were obtained" is plainly not sound and overlooks the very real protection the requirements of the statute afford. In the first place, when a customer comes to an optician with lenses to be inserted in new frames or to be duplicated, the optician does not know, as the court below assumed, whether the customer had in fact submitted to a professional examination by a qualified eye examiner, or whether the glasses had been made in violation of the law. He does not even know whether the glasses actually belong to the customer or whether they were originally made for him. But more important still, even if the glasses had originally been made for the particular customer in accordance with a proper prescription, the optician has no information and, indeed, no qualifications, with respect to the vitally important questions whether those glasses are the proper glasses for the person to be wearing at that time or for some time in the future, or whether any glasses at all are now necessary. It is no answer to suggest that the optician can inquire how long ago the glasses were made or when the person last had his eyes examined, and, where he thinks it appropriate, refer the person to some qualified professional eye examiner. These are professional judgments, not to be made by the unqualified optician. The salutary effect of the Oklahoma statute is to provide that such judgments be made by qualified professional men, a requirement that the State of Oklahoma is certainly free to make. See *Roschen* v. *Ward*, 279 U. S. at 339; *Commonwealth* v. *S. S. Kresge Co.*, 267 Mass. 145, 166 N.E. 558; *Commonwealth* v. *Ferris*, 305 Mass. 233, 25 N. E. (2d) 378; *Klein* v. *Dept. of Registration and Education*, 412 Ill. 75, 105 N. E. (2d) 758, cert. den. 344 U. S. 855; cf. *Curtis* v. *Registered Dentists of Oklahoma*, 193 Okla. 233, 143 P. (2d) 427; *Curtis* v. *State*, 78 Okla. Cr. 282, 142 P. (2d) 465. In the *Klein* case, *supra*, the Supreme Court of Illinois, in upholding the validity of a requirement that records of all prescriptions be preserved

for at least three years, recognized the desirability of periodic eye examinations stating (412 Ill. 75, 81, 105 N.E. (2d) 758, 762):

> It is common knowledge that the eye continues to vary from normal even when spectacles are worn and that in some instances the spectacles may have the corrective effect of causing the eye to return to normal. In either case, periodic examinations result and reference to previous treatment and prescription would insure more comprehensive and intelligent treatment.

While the provisions of section 2 here under consideration do not require periodic eye examinations, they do make the purchase of new frames or the duplication of old lenses the occasion for a professional eye examination by a licensed optometrist or ophthalmologist. This would seem to be a most reasonable requirement. The purchase of a new pair of frames or the duplication of old lenses involves the expenditure of money, and such cost naturally tends to make a person try to get along for some time with the glasses for which he has incurred the expense. If there were no eye examination at that time, the expenditure would have the effect of delaying or eliminating an eye examination that would normally be sought otherwise. The Oklahoma legislation prevents just that. And since its effect is to make persons seeking new frames or duplicate lenses "have their eyes carefully tested and their glasses made according to special prescriptions, it cannot be said that the result on the whole might not be desirable." *Roschen* v. *Ottinger*, 29 F. (2d) 762, 764 (S.D.N.Y.).

It is true that where an optician already has a customer's prescription on file, he is authorized by the statute to perform the services with which we are dealing,[10] with the result that the customer whose prescription is on file would not be required to have a new examination by a registered optometrist or ophthalmologist. Plaintiffs, of

[10] Section 2 also provides that the optician "may continue to do said acts on the aforesaid written prescription or its duplicate."

course, cannot complain of this, and furthermore, "a statute is not invalid under the Constitution because it might have gone farther than it did," (*Roschen* v. *Ward*, 279 U. S. at 339) and in all cases actually require a new eye examination by a professional eye examiner. Nor can plaintiffs complain that the effect of the legislation is to cause expense, in some cases, to citizens of Oklahoma who might be required to consult an optometrist or ophthalmologist for an eye examination. Furthermore such a contention is without merit. As Judge A. N. Hand stated in the *Ottinger* case, *supra*, with respect to a similar suggestion concerning the expense of professional eye care (29 F. (2d) at 763):

> In respect to the first contention, it might equally have been made as an objection to requiring a license to practice medicine. There are some remote localities even now that might be better off if persons having some experience in nursing were allowed to practice medicine than to be compelled in many cases to do without medical treatment because physicians are unavailable. Yet the Legislature has regarded the temptation to use makes shift remedies and employ quacks as so strong, and the results in general as so bad, that it has rigorously prohibited the practice of medicine except by licensed physicians. The same is true of law practice, and the hardship of being compelled to employ men educated at large expense, where in some cases self-taught practitioners, who have never been admitted to the bar, might have answered the purpose as well, is no answer to the requirement.

The court below was mistaken when it asserted that section 2 of the Oklahoma Act had the effect of "arbitrarily legislating many of the skilled artisans out of a long recognized trade" and that the "action by the legislature in the instant act is as unreasonable as if pharmacists were divested of their right to do business by legislative action which delegated to physicians the absolute control and responsibility for accurate *compounding* of medical prescriptions for the reason that a physician alone is qualified to

prescribe drugs for patients." (R. 49-50). The Act does not in any sense legislate opticians out of business; nor does it transfer opticians' business elsewhere.[11] Opticians are still free to ply their trade and to dispense their services. What the Act does is to make sure that the optician's services are dispensed in the public interest. This it does by requiring a prescription from a qualified professional eye examiner before the services here involved are dispensed, and an optician is not a professional eye examiner. This limitation is no different than existing limitations on pharmacists who cannot dispense certain drugs without a physician's prescription. The optician's business is not taken in any sense (cf. *Breard* v. *Alexandria*, 341 U. S. 622, 632-633); only the manner in which it may be carried on is regulated in the public interest in order to protect the public from the evils which would result in the absence of such salutary restrictions—evils, incidentally, of which the court below was aware when it stated (R. 44):

> Unquestionably, the general health and welfare could suffer as a result of promiscuous and indiscriminate fittings of eyeglasses by persons unqualified to examine the eyes, particularly where the examiners were not qualified to recognize, even if not treat, various diseases of the eye. * * *[12]

[11] Section 2 provides that "the physician or optometrist writing such prescription shall remain responsible for the full effect of the appliances so furnished by such other person." The court below stated that the effect of this provision "is to place within the exclusive control of optometrists and ophthalmologists the power to choose just what individual opticians will be permitted to pursue their calling" (R. 49, n. 20). In the first place, optometrists do not refer their patients to opticians, and in the second place, there is nothing in the record to suggest that reputable ophthalmologists do not hold themselves responsible in the absence of statutory provisions such as this, or that some or most ophthalmologists do not ordinarily direct their patients to particular opticians in whose qualifications they have confidence. Finally, there is no constitutional right in any individual optician to be free of the competition of better qualified opticians.

[12] In an effort to show the damaging effect of section 2 on the opticians' business the court below stated (R. 45, n. 16): "As

The effort of the court below (R. 46-47) to minimize the importance of accurate eye examination in order to show that the services here involved are not reasonably related to the public health and welfare is, indeed, surprising, but, in any event, it proves too much. If it is of no importance that glasses are improperly fitted because "the doctor was a little careless that morning," so long as the patient has no discomfort, and if it is of no importance that lenses be on the proper axis, or that persons not wear the "screwiest type of glasses," (R. 46) then there is no real basis for any legislation at all in the field of visual care. The fact is, however, as the record shows (R. 44, 99, 104, 106, 108-109, 241-242, 388) that improperly fitted glasses result in headaches, nervousness and loss of efficiency, and these are evils which the State can protect its citizens against.

One would gather from the reading the opinion of the court below that the State of Oklahoma was alone in enacting legislation such as the provisions of section 2 here under consideration. But that is by no means the case. The reasonableness of the Oklahoma legislation is evidenced by the fact that many other states have thought it to be of sufficient importance to the public health and welfare of their citizens to enact similar legislation. Yet three federal judges assert that all those state legislatures were

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demonstrated by the evidence the dispensing optician has two things to sell; lenses and frames. If prospective purchasers of frames are required to go to an ophthalmologist or optometrist to get an ophthalmic prescription, inasmuch as the optometrist fills all of his own (and actually sells between 60-70% of the eyeglasses sold) the inevitable effect will be to deprive the optician of a sizeable amount of trade." But the court's conclusion does not follow. Concededly, a person must go to either an optometrist or an ophthalmologist for a prescription for his original pair of eyeglasses, and there is nothing in the record to suggest that a person who had originally used the services of an optometrist would not return there for a new frame or a duplicated lense, even if no prescription were necessary, rather than go to a new optician. And since the ophthalmologist does not *fill* prescriptions, the optician can point to no loss of business from those who return to ophthalmologists for prescriptions. Indeed any legitimate business that the opticians might lose as a result of the requirements of section 2 is purely hypothetical.

acting without any rational basis. Seventeen other states have enacted legislation which specifically prohibits the duplication of ophthalmic lenses without a prescription from a licensed optometrist or ophthalmologist.[13] And twelve other states include in their definition of the profession of optometry the adapting, fitting, adjusting, applying or employment of frames, mountings or other optical appliances to correct errors of vision, and provide that this cannot be done by one not a licensed optometrist, except on prescription.[14] All this legislation would fall if the decision of the court below were affirmed as to section 2.[15]

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[13] Arkansas Stats. Annot. (1947) sec. 72-801; Deering's California Codes (Business and Professions) Supp. 1949, sec. 3042; Idaho Code Annot. (1948), sec. 54-1517; Burns Indiana Stats Annot. (1951) 63-1019(e); Iowa Code Annot. (1949) sec. 154.9; Louisiana Rev. Stats. (1950) sec. 1065; Rev. Stats. of Maine (1944) c. 69, secs. 6 (IV), 7; Rev. Codes of Montana (1947) sec. 66-1302(9); Nevada Compiled Laws (Supp. 1943-1949) sec. 4966(e); New Mexico Stats. Annot. (1941) 51-702, 51-703, 51-713 (j); General Statutes of North Carolina, sec. 90-115; Oregon Compiled Laws Annot. (1940) 54-722; Williams Tennessee Code Annot. (1934) sec. 7027(1), 7028; Utah Code Annot. (1953) 58-16-11(4); Code of Virginia (1950) sec. 54-396(10); West Virginia Code of 1943, sec. 2931(d) 2933; Wyoming Compiled Stats. (1945) sec. 37-1802.

[14] Deering's California Codes (Business and Professions) Supp. 1949 (sec. 3041); Colorado Stats. Annot. (1935) c. 120, sec. 1; Florida Stats. Annot. (1952) sec. 463.01; Idaho Code Annot. (1948) sec. 54-1501; Louisiana Rev. Stats. (1950) sec. 1041(3); Rev. Stats. of Maine (1944) c. 69, sec. 6(III); Page's Ohio General Code Annot. sec. 1295-21, 1295-22; Oregon Compiled Laws Annot., 54-701; Supp. to South Dakota Code of 1939, sec. 27.0701; Williams Tennessee Code Annot. (1934) sec. 7027(1); Utah Code Annot. (1953) 58-16-11(4); Remington's Rev. Stats. of Washington Annot., sec. 10147.

[15] In addition, the statutes of substantially all of the states define the practice of optometry to include the adapting of lenses or prisms for the aid of human vision, and make it unlawful for one to practice optometry without a license. The decision of the court below, insofar as it permits the adapting of frames to one's face by an unprofessional person without a prescription, appears to constitute judicial sanction to violate all of these statutes, the validity of which the court does not seem to doubt, because a frame is not adapted to one's face without lenses in them.

We think it is clear, on both principle and authority, that the provisions of section 2 of the Oklahoma Act here under consideration do not offend the provisions of the due process clause of the Fourteenth Amendment.

Equal Protection—As we have already pointed out, the court below also held section 2 invalid on the additional ground that it violated the equal protection clause of the Fourteenth Amendment. The denial of equal protection was found in "the fact that section 3 exempts from regulation all sellers of ready-to-wear glasses, even though such sellers, from the viewpoint of public health and welfare, lie within the identical class and circumstance occupied by 'fitters and sellers of frames' and 'duplicators of lenses and entire spectacles.'" (R. 51) This holding of the court below is plainly unsound. *American Federation of Labor* v. *American Sash & Door Co.*, 335 U. S. 538; *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, *Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608; *Hayman* v. *Galveston*, 273 U. S. 414, *McNaughton* v. *Johnson*, 242 U. S. 344; *Watson* v. *Maryland*, 218 U. S. 173.

It is well settled that a State is not bound "to strike at all evils at the same time or in the same way" (*Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608, 610) and that "the existence of evils against which the law should afford protection and the relative need of different groups for that protection 'is a matter for the legislative judgment.'" *American Federation of Labor* v. *American Sash & Door Co.*, 335, U. S. at 542. In the instant case the legislature of Oklahoma provided that nothing in the Oklahoma Act should "prohibit the sale of ready-to-wear glasses equipped with convex spherical lenses * * * when sold as merchandise at any established place of business and where the selection of the glasses is at the discretion of the purchaser." This was a judgment that the Oklahoma legislature was entitled to make, and the reasonableness of this judgment is evidenced by the

fact that thirty-nine states and the District of Columbia specifically exempt the sale of ready-to-wear glasses from their visual care legislation.[16] And all but one of the states which make it unlawful to duplicate lenses without a prescription specifically exempt the sale of ready-to-wear eyeglasses from their legislation.[17] In addition, all but one of the states which include the adapting, fitting, or adjusting of frames, mountings or other optical appliances within the definition of optometry specifically exclude the sale of ready-to-wear glasses from their legislation.[18]

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[16] Code of Alabama (1940) Title 46, sec. 209; Arizona Code Annot. (1939) sec. 67-1407; Arkansas Stats. Annot. (1947) sec. 72-819; Deering's California Codes (Business and Professions) (1944) sec. 3043; Colorado Stats. Annot. (1935) c. 120, sec. 19; Delaware Code Annot. (1953), Title 24, sec. 2117; D. C. Code Annot. (1951) sec. 2-520; Florida Stats. Annot. (1952) sec. 463.16; Code of Georgia Annot. (1937) sec. 84-1108; Idaho Code Annot. (1948) sec. 54-1515; Jones Illinois Stats. Annot. (1953 Cum. Supp.) sec. 94.20; Iowa Code Annot. (1949) sec. 154.2; Kentucky Rev. Stats. (1953) sec. 320.010(4) Louisiana Rev. Stats. (1950) sec. 1065; Rev. Stats. of Maine (1944) c. 69, sec. 7; Annot. Code of Maryland (Flack, 1951) Art. 43, sec. 362; Annot. Laws of Mass. (1949) c. 112, sec. 73; Michigan Stats. Annot. (1937) c. 123, sec. 14.647(d); Mississippi Code Annot. (1942) sec. 8846; Vernon's Annot. Missouri Stats. (1952) sec. 336.120(3); Rev. Codes of Montana (1947) sec. 66-1316; Rev. Stats. of Nebraska (1943) sec. 71-1,134; Nevada Compiled Laws (1929) sec. 4980; Rev. Laws of New Hampshire (1942) c. 253, sec. 13; New Mexico Stats. Annot. (1941) 51-714; General Stats. of North Carolina, sec. 90-124; North Dakota Rev. Code of 1943 (Supp. 1953) 43-1302; Page's Ohio General Code, sec. 1[illegible]34; Oregon Compiled Laws Annot. (1940) 54-702; Purdon's Penna. Stat. Annot., title 63, sec. 240; Code of Laws of South Carolina (1952) sec. 56-1083; Williams Tennessee Code Annot. (1944) 7028; Vernon's Texas Civil Stats, Articles 4552, 4565 d, 4566; Utah Code Annot. (1953) 58-16-13(3); Vermont Stats. (1947 Revision) sec. 6883; Code of Virginia (1950) sec. 54-369; Remington's Rev. Stats. of Washington (Supp. 1940) sec. 10159; West Virginia Code of 1943, sec. 2933(d); Wisconsin Stats. (1953) c. 153, sec. 153.02(2); Wyoming Compiled Stats. (1945) sec. 37-1802.

[17] See fn. 13, *supra*. The legislation of Indiana contains no specific exemption for the sale of ready-to-wear glasses.

[18] See fn. 14 *supra*. Only the South Dakota legislation contains no specific exemption.

Contrary to what the court below said, there is in fact a basis for the exercise of the judgment of the Legislature of Oklahoma on this subject. The American Optometric Association does not approve the sale of ready-made glasses (which only magnify) over store counters nor does it approve of self-prescription. There are distinct differences between ready-made eyeglasses and the eyeglasses which are prepared and dispensed pursuant to prescription. In the case of the ready-made glasses, the patient prescribes for himself. In the second case, he has deliberately gone to an ophthalmologist or an optometrist for a "custom made" prescription to fit and alleviate and correct the conditions of his own particular vision. Furthermore, the lenses in ready-made glasses are always restricted to mere magnifying lenses, whereas the lenses in eyeglasses which have been prescribed by an ophthalmologist or an optometrist can and do range the entire gamut of powers.

The court below was mistaken in holding that the sale of ready-made glasses is the same as the sale of glasses dispensed pursuant to examination. The Oklahoma Legislature had the perfect right to concede that the sale of ready-made glasses constituted less of an evil than the sale of glasses of any power without prescription. The Legislature could attack both evils or either. They are certainly not the same evils even though the result in each case might be an impairment of visual efficiency and comfort. The choice of which evil should be regulated rests with the Legislature and not with the court.

The indiscriminate use of ready-to-wear magnifying glasses has a relationship to the public health and welfare which should be regulated, as in the State of New York (see *Roschen* v. *Ward*, 279 U. S. 337). The seeing ease and comfort which ready-to-wear glasses provide in many cases may hide serious eye ailments and consequently delay their discovery, detection and treatment. Although we believe that the sale of ready-to-wear glasses should

not be left uncontrolled to be governed by the standards of the market place, we can understand clearly the basis of the legislative judgments in the great majority of the states exempting such sales from regulation. As we have pointed out several times, the State of New York does not permit such sales unless a duly registered optometrist is in charge of the booth where the sale is made. On the other hand, the New York statute specifically provides that "duplications, replacements, reproductions or repetitions may be made without prescription." (16 McKinney's Consol. Laws of N. Y., sec. 7120; see also sec. 7109). Under the decision of the court below, this exemption in the New York statute renders invalid the New York regulation of the sale of ready-to-wear glasses on the grounds of a denial of equal protection, and the *Roschen* case was, therefore, wrongly decided by this Court. The fact is that these are choices to be made by the State legislatures as matters of policy. "Matters of policy, however, are by definition matters which demand the resolution of conflicts of value, and elements of conflicting values are largely imponderable. Assessing of their competing worth involves differences of feeling; it is also an exercise in prophecy. Obviously the proper forum for mediating a clash of feelings and rendering a prophetic judgment is the body chosen for those purposes by the people. Its functions can be assumed by this Court only in disregard of the historic limits of the Constitution." Mr. Justice Frankfurter, concurring in *American Federation of Labor* v. *American Sash & Door Co., Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co., and Whitaker* v. *North Carolina*, 335 U. S. 542, 557.[19]

[19] The suggestion in the court below that the Oklahoma Act was sponsored by the optometrists as a group is immaterial. *Breard* v. *Alexandria*, 341 U. S. 622, 636, n. 20; *Daniel* v. *Family Security Life Insurance Co.*, 336 U. S. 220, 224; *Roschen* v. *Ward*, 279 U. S. 337, 340.

II

The Challenged Portions of Section 3 of the Oklahoma Act Do Not Offend any Provision of the Federal Constitution

The provisions of Section 3 of the Oklahoma Act which are here involved are those which make it unlawful "for any person, firm, company, corporation or partnership to solicit the sale of spectacles, eyeglasses, lenses, frames, mountings, prisms or any other optical appliances or devices * * * by radio, window display, television, telephone directory display advertisement, or by any other means of advertisement."[20]

It is the position of the American Optometric Association that these provisions are in all respects valid under the Constitution of the United States.

Due Process—The advertising restrictions of Section 3 apply to licensed optometrists and to any ophthalmologists who offer for sale any of the optical devices mentioned therein. Section 3 is, therefore, in part, a regulation of the conduct of professional people.[21] The restrictions in section 3 apply also to opticians and to any one else who offers for sale the optical devices mentioned in the section. But the inclusion within the scope of section 3 of these non-professional classes who would prefer to sell eye glasses,

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[20] The court below limited its holding of unconstitutionality to "frames, mountings, * * * or any other appliances," and while the court stated generally that its specific holdings of invalidity were made "without impliedly sanctioning all other provisions of this Act" (R. 44), it seems clear from the portion of the opinion dealing specifically with section 3 that it upheld the advertising restrictions in section 3 relating to the other articles mentioned. Judge Murrah, in his dissent (R. 64) so construed the court's holding, and so do the plaintiffs who challenge the court's holding with respect to "spectacles, eye glasses, lenses * * * (and) prisms" in their appeal in No. 185. Section 3 also forbids the advertising of "eye examinations" and "visual services," but the validity of the restriction as to them is apparently not in issue here.

[21] The court below conceded that the profession of optometry might be regulated in the interests of public health and welfare identically with the "fields of medicine and dentistry." R. 54-55.

etc. in accordance with mercantile practices and without regard to the ethics and standards designed to afford protection to the public health and welfare does not present any independent ground of constitutional invalidity. The practices of these groups were, and had to be, regulated in order that the evils, which the statute was designed to eliminate, might not be accomplished by indirection. See *Roberts Optical Co.* v. *Dept. of Registrations and Education*, No. 33139, S. Ct. of Illinois, decided October 24, 1954; *Lasdon* v. *Hallihan, Director of Registration and Education*, 377 Ill. 187, 36 N. E. (2d) 277; *State* v. *Rones*, 223 La. 839, 67 So. (2d) 99; *Commonwealth* v. *Ferris*, 305 Mass. 233, 25 N. E. (2d) 378; *Curtis* v. *Registered Dentists of Oklahoma*, 193 Okla. 233, 143 P. (2d) 427; *Curtis* v. *State*, 78 Okla. Cr. 282, 142 P. (2d) 465.[22] If "it is against the

[22] In the *Lasdon* case, *supra*, involving advertising by a dental laboratory, and not dentists, the Supreme Court of Illinois stated (377 Ill. at 194-195):

"It is obvious that if they (dental laboratories) were permitted to thus advertise their business, the practice of the profession of dentistry would, to a great degree, be subservient to those engaged in the making of the plates. It is well known that masses of the public do not comprehend or understand the skill that is necessary to the making of proper dentures. Such persons are often attracted by the advertisements of the quack and charlatan and seek his services. * * *

"If the advertisement carried on by the dental laboratories was the medium that brought the customer to the laboratory, and he was sent from there to Dr. Hejna's office, it would, as to its effect upon the dental profession, be much the same as though he had come to Dr. Hejna's office in answer to an advertisement of Dr. Hejna's, which is prohibited by sections 18 and 18b of the Act. If the restrictions of which appellants complain were removed, it would permit licensed dentists receiving patients referred to them by the dental laboratories to do indirectly what other provisions of the Act prohibit them from doing directly."

In the *Roberts Optical Co.* case, *supra*, the Supreme Court of Illinois, relying on the *Lasdon* decision, upheld the advertising restrictions of the Illinois Optometric Practice Act, as applied to opticians employing registered optometrists which the Illinois Act permitted. The court stated: "The power of the legislature to regulate advertising practices does not depend upon whether plaintiff's occupation is called a trade or a profession, but upon

best interest of the public to have the number of eyeglasses worn determined by mercantile practices rather than the actual visual need of the people," based on unsolicited professional advice, as the court below states (R. 53-54), then it is the same evil whether the mercantile practices are carried on by licensed optometrists or whether they are carried on by non-professional merchandisers. Legislation, to be effective, necessarily must control the practices of both groups, and it is for this obvious reason that so many of the state statutes which regulate advertising in the field of visual care are all-inclusive in their coverage,[23] applying to all persons, professional and non-professional alike.

In *Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608, this Court had before it legislation of the State of Oregon which limited advertising by dentists.[24]

whether it is of a character such that commercialized exploitation might endanger the public health. What was said in rejecting a similar contention advanced by operators of dental laboratories who advertised the sale of dentures is applicable here.

[23] Code of Alabama (1940) Title 46, sec. 211; Arkansas Stats. Annot. (1947) sec. 72-815; Deering's California Codes (Business and Professions) secs. 3120, 3130, Colorado Stats. Annot. (1935) c. 120, secs. 21, 22; Florida Stats. Annot. (1953) sec. 463.14; Burns Indiana Stats. Annot. (1951) 63-1019(d), (f); General Stats. of Kansas Annot. (1949) 65-1504(h); Kentucky Rev. Stats. (1953) sec. 320.020(4); Louisiana Rev. Stats. (1950) sec. 1063(9); Annot. Laws of Mass. (1949) c. 112, sec. 73A; Mich. Stats. Annot. (1937) c. 123, sec. 14.648(h); Vernon's Annot. Missouri Stats. (1952) sec. 336.200; Rev. Codes of Montana (1947) sec. 66-1302(11); New Jersey Stats. Annot. (Supp. 1953) 45:12-19; New Mexico Stats. Annot. (1941) 51-713 (k) (l) (m); Code of Laws of South Carolina (1952) sec. 56-1075; Code of Virginia (1950) sec. 54-396 (4), (6), (); Remington's Rev. Stats. of Washington (Annot.) sec. 10152 (10)-(15); Wisconsin Stats. (1953) c. 153, sec. 153.10; Wyoming Compiled Stats. (1945) 37-1807.

[24] In addition to advertising of an untruthful or misleading nature, the legislation prohibited "advertising professional superiority or the performance of professional services in a superior manner; advertising prices for professional service; advertising by means of large display, glaring light signs, or containing

In sustaining the validity of the legislation, Mr. Chief Justice Hughes stated (294 U. S. at 612-613):

> The legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the market place. The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief. And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. What is generally called the "ethics" of the profession is but the consensus of the expert opinion as to the necessity of such standards.
>
> It is no answer to say, as regards appellant's claim of right to advertise his "professional superiority" or his "performance of professional services in a superior manner," that he is telling the truth. In framing its policy the legislature was not bound to provide for determinations of the relative proficiency of particular practitioners. The legislature was entitled to consider the general effects of these practices which it described, and if these effects were injurious in facilitating unwarranted and misleading claims, to counteract them by a general rule even though in particular instances there might be no actual deception or misstatement.

The limitations and restrictions on advertising in the field of dentistry are equally applicable and equally valid

as part thereof the representation of a tooth, teeth, bridge work or any portion of the human head; employing or making use of advertising solicitors or free publicity press agents; or advertising any free dental work, or free examination; or advertising to guarantee any dental service, or to perform any dental operation painlessly." 294 U. S. at 609.

in the field of visual care,[25] and the highest courts of the states which have considered the problem have so held. In *Klein* v. *Department of Registration and Education*, 412 Ill. 75, 105 N. E. (2d) 758, cert. den. 344 U. S. 855, the Supreme Court of Illinois sustained legislation which prohibited certain kinds of optical display advertising on signs, in windows and telephone directories, and which prohibited displaying spectacles, frames, mountings, glass cases, optical equipment or merchandise in office windows or in display cases that could be seen from the outside. In *State* v. *Romes*, 223 La. 839, 67 So. (2d) 99, the Supreme Court of Louisiana sustained legislation which prohibited the advertising of optometric services for a price and the advertising of the price of lenses, eyeglasses, frames and fittings. In *Commonwealth* v. *Ferris*, 305 Mass. 233, 25 N. E. (2d) 378, the Supreme Judicial Court of Massachusetts upheld the validity of legislation prohibiting the advertising of a frame or mounting at a price unless coupled with a statement that the price did not include lenses, eye examination, or professional services. It also prohibited the advertising of lenses, or complete eyeglasses at a price and any statement about underselling competitors. And only recently the Supreme Court of South Dakota upheld the validity of a restriction which completely prohibited optometrists from engaging in any "public advertising by printed matter, radio, window display, road signs, clock signs, hand-bills, posters, circulars, novelties, favors * * *." *Norwood* v. *Parenteau*, S. Ct. S. D. (1954), 63 N. W. (2d) 807. See also *Seifert* v. *Bahl Optical Co.*, 276 Mich. 692, 268 N. W. 784 (no advertising of optometric services at a price); *City of Springfield* v. *Hurst*, 144 Ohio St. 49, 56 N. E. (2d) 185 (no advertising by newspaper, radio display or otherwise of the price of lenses, complete eyeglasses,

[25] "It would seem that the public has as much need to be protected from quacks and charlatans in optometry as in dentistry or any other subdivision of medicine." *State ex rel Sisemore* v. *Standard Optical Co. of Oregon*, 182 Or. 452, 460, 188 P. (2d) 309, 312.

either with or without optometric services, or credit terms, installment payments or price plans); *Ritholz* v. *Commonwealth*, 184 Va. 339, 35 S. E. (2d) 210, (no advertising of the sale of eyeglasses, lenses, frames, mountings for a price, no advertising of low prices, free eye examinations, guaranteed work, etc.); cf. *Ritholz* v. *City of Detroit*, 308 Mich. 258, 13 N. W. (2d) 283; *Kindy Opticians, Inc.* v. *Michigan State Board of Examiners*, 291 Mich. 152, 289 N. W. 112. Indeed, the court below, citing *Curtis* v. *Registered Dentists of Oklahoma*, 193 Okla. 233, 143 P. (2d) 427 and the *Semler* decision by this Court, agrees that the legislature has authority to regulate and control advertising "which not only tends to persuade the public to submit to eye examinations but also tends to result in the purchase of completed pairs of spectacles. * * * Thus, any statute which regulates advertising in regard to eye examinations (that is, for eye diseases and for refraction, by one qualified to recognize, if not treat, diseases of the eye) or other advertising which promotes the sale of eyeglasses (particularly the original pair) upon mere merchandising principles rather than in regard to the actual visual need, can be deemed rationally related to the public health and welfare." (R. 55).

Consequently, the court below did not hold invalid the advertising provisions of the Oklahoma Act insofar as they related to the sale of spectacles, lenses, * * * (or) prisms." To do so the court would have had to disregard substantially all the relevant decisions in the same and related fields. See *Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608; *Dr. Bloom Dentist, Inc.* v. *Cruise*, 259 N. Y. 358, 182 N. E. 16, appeal dismissed 288 U. S. 588; *Klein* v. *Dept. of Registration and Education*, 412 Ill. 75, 105 N. E. (2d) 758, cert. den. 344 U. S. 855; *Lasdon* v. *Hallihan*, 377 Ill. 187, 36 N. E. (2d) 237; *Commonwealth* v. *Ferris*, 305 Mass. 233, 25 N. E. (2d) 378; *Seifert* v. *Buhl Optical Co.*, 276 Mich. 692, 268 N. W. 784; *Abelson's Inc.* v. *New Jersey State Board of Optometrists*, 5 N. J. 412, 75 Atl. (2d) 867, 22 A.L.R. (2d) 929; *Curtis* v. *Regis-*

tered Dentists of Oklahoma, 193 Okla. 233, 143 P. (2d) 427; *Curtis* v. *State*, 78 Okla. Cr. 282, 147 P. (2d) 465; *Norwood* v. *Parenteau*, S. Ct. of S. D. (1954), 63 N. W. (2d) 807; *Ritholz* v. *Commonwealth*, 184 Va. 339, 35 S. E. (2d) 210. But insofar as the advertising provisions of the Oklahoma Act applied to the sale of "frames, mountings, * * * or any other optical appliances," they were constitutionally deficient, in the court's view, because "advertising directed exclusively at this feature of eye wear can have no deleterious effect on the public, inasmuch as it has no influence on the *prospective* wearer of eyeglasses, and to the *present* wearer (a person already examined by a licensed professional) is but a mere piece of merchandise." (R. 58).[26]

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[26] We believe that the foregoing is the essence of the court's opinion on this point. Although the court pointed out that the Oklahoma Act was a prohibition rather than a mere regulation of advertising (120 F. Supp. at 141), that could not have been a vital distinction in the court's view, inasmuch as it did not hold invalid the so-called prohibition with respect to "spectacles, eyeglasses, lenses, * * * (or) prisms." In any event, the prohibition of all non-professional advertising by optometrists has been sustained. *Norwood* v. *Parenteau, supra;* but cf. *State* v. *Rones*, 223 La. 839, 67 So. (2d) 99. Moreover, the Oklahoma Act is no more of a prohibition than the sum of the restrictions spelled out in detail in many of the state statutes, *supra*, n. 23.

The Oklahoma Act specifically provides in section 3 that nothing contained in the Act shall "prevent the use of ethical, professional notices," and to that extent does not prohibit legitimate professional advertising. The Rules of Practice of the American Optometric Association, adopted June 28, 1950, provide in this regard as follows:

> E. No member shall display his license, diplomas, or certificates in such manner as to be seen and read from outside his office.
>
> F. No member shall hold himself forth in such a way as to carry the slightest intimation of having superior qualifications or being superior to other optometrists.
>
> G. No member holding an official position in any optometric organization shall use such position for advertising purposes or for self-aggrandizement.
>
> H. No member shall display any sign containing other than name, profession, and office hours; same to be used only on office windows or at entrance to his office. Letters must

The court's decision, then, turns essentially on what it believed to be a distinction between eyeglass lenses and eyeglass frames. Substituting its judgment for that of the Oklahoma legislature in flagrant disregard of well-settled judicial principles already referred to, the court isolated "frames, mountings * * * and other optical appliances" from their statutory context and concluded that their sale, unlke the sale of spectacles and eyeglasses, bore no rational relationship to the public health and welfare and that, accordingly, the advertising restrictions as to them were beyond the power of the State of Oklahoma to enact. In so ruling the court below not only misconceived its function as a federal court reviewing State legislation enacted under the police power, but it failed to appreciate the very real and vital relationship to the public health and welfare of the provisions which it invalidated. As Judge Murrah, in his dissent, stated, "considered in isolation, an eyeglass frame or mounting is no more than a mere piece of merchandise. But considered in the context of the total field of visual care, it takes on a significant relationship to the visual needs of the public and ceases

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not be luminous or illuminated and must not be more than 4" in height for street level and 7" in height for office above street level.

I. No member shall display eyeglass signs or painted or decalcomania eyes anywhere.

J. No member shall use other than his professional card on or in any publication or in any public display; said card shall not exceed two (2) columns by two (2) inches, and it shall not contain any more than his name, profession, address, telephone number, office hours, eye examinations by appointment, practice limited to ..... (any one optometric specialty.) Educational material may be published only when it has been specifically approved by the executive committee of the respective state association.

K. No member shall use bold-face type or in any other manner attempt to attract special attention to himself in any telephone or other public directory.

L. No member shall display any merchandise, ophthalmic material or advertising of any kind in windows or in any room of his office for the purpose of inducing patronage.

to be a mere piece of merchandise to be dealt with in the market place on an arm's length basis" (R. 65).

The court refused to find a "significant relationship to the visual needs of the public" in advertising the sale of eyeglass frames, for two main reasons, as we have already pointed out. First, such advertising could have no influence on *prospective* wearers of eyeglasses, and secondly, insofar as *present* wearers are concerned, a frame is but a mere piece of merchandise. A more narrow, unrealistic view can hardly be imagined, a view which "misconceive(s) the public good by confounding private notions with constitutional requirements." Mr. Justice Frankfurter, concurring in *Whitaker* v. *North Carolina*, etc., 335 U. S. at 556.

With respect to *prospective* wearers of eyeglasses, and, indeed, with respect to *present* wearers also, it is absurd to ponder whether an advertisement of a complete pair of eyeglasses (which the court concedes may be controlled) is a greater attractive nuisance than is an advertisement of a frame alone and whether one advertisement is more apt to develop a new eyeglass wearer than the other. Either advertisement might have no effect on some people; both might influence others equally or in different degrees; and some persons might be influenced by one advertisement and not by the other. But these cannot be constitutional differences. It seems clear that the restriction of the advertisement of a frame or mounting, no less than the restriction of the advertisement of a complete pair of eyeglasses, will "tend to diminish an evil" and such restriction is not invalid "because it may not succeed in bringing about the result that it tends to produce." *Roschen* v. *Ward*, 279 U. S. at 339.

Moreover, it is beside the point to say that frames are but a mere piece of merchandise. Many persons also may think of a second pair of eyeglasses as merely merchandise. But the court concedes that restrictions on "advertising which promotes the sale of complete eyeglasses," even second pairs, is valid. (R. 55). The fact is that people do not buy

frames, as such, to be worn without lenses. The only function of frames is to hold lenses in proper position before the eyes. Frames are purchased to be worn with lenses, either as a completely new pair of glasses or to hold old lenses to be inserted in them, and they are not "mere piece(s) of merchandise" in the sense that the court used the phrase. If not correctly made, assembled, and fitted, frames may not only be useless, but affirmatively harmful. Their sale is directly related to the public health and welfare; and advertising restrictions with respect to their sale is also necessarily so related. There is absolutely no basis whatsoever for any distinction between completed eyeglasses and eyeglass frames insofar as advertising restrictions are concerned, and the State of Oklahoma, just as many other states do,[27] was free to include frames,

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[27] The advertising restrictions contained in the legislation of the following states specifically apply to frames, mountings, fittings, optometric materials, etc.: Deering's California Codes (Business and Professions) (1944) sec. 3129; Delaware Code Annot. (1953) Title 24, sec. 2113; Florida Stats. Annot. (1953) sec. 463.14; Jones Illinois Stats. Annot. (1953 Cum. Supp.) sec. 94.29(m); Burns Indiana Stats. Annot. (1951) 63-1019(d), (f); Kentucky Rev. Stats. (1953) secs. 320.020(4), 320.080 (2)(d)(e); Louisiana Rev. Stats. (1950) sec. 1063(9); Annot. Laws of Mass. (1949) c. 112, sec. 73A; Rev. Codes of Montana (1947) sec. 66-1302(11); Nevada Compiled Laws (Supp. 1943-1949) secs. 4982(a)(d); New Jersey Stats. Annot. (Supp. 1953) 45:12-11(j)(p)(r); New Mexico Stats. Annot. (1941) 51-713(k) (m); General Stats. of North Carolina (Supp. 1953) sec. 90-124(3); Oregon Compiled Laws Annot. (1943 Supp.) 54-73(6); General Laws of Rhode Island (1938) c. 277, sec. 11; Supp. to South Dakota Code of 1939, sec. 27.0707; Williams Tennessee Code Annot. (1934) 7028; Utah Code Annot. (1953) 58-16-14(5); Code of Virginia (1950) sec. 54-396(9); Remington's Rev. Stats. of Washington (Annot.) sec. 10152(12); West Virginia Code of 1950 (Annot.), sec. 2927; Wisconsin Stats. (1953) c. 153, sec. 153-10; Wyoming Compiled Stats. (1945) sec. 37-1807(e).

The advertising restrictions in the following states are applicable generally and are not limited to eyeglasses, lenses, or prisms only: Code of Alabama (1940) Title 46, sec. 211; Idaho Code Annot. (1948) sec. 54-1512; Rev. Stats. of Maine (1944) c. 69, sec. 14V; Annot. Code of Maryland (Flack, 1951) Art. 43, sec. 358; Mich. Stats. Annot. (1937) c. 123, sec. 14.648(h); Minn.

mountings and other optical appliances within the scope of its legislation. See cases cited *supra*, pp. 38-39.

Interstate Commerce—Plaintiffs also contend that the advertising restrictions of section 3 of the Oklahoma Act are invalid under the commerce clause of the federal Constitution because they prohibit advertising by radio, television, newspapers and other media of interstate communication. Although the court below made no reference to the contention, it necessarily must have rejected it because it failed to hold the advertising restrictions invalid insofar as they related to "spectacles, eyeglasses, lenses * * * (or) prisms." It could not have done so, if it had thought that plaintiffs' contention as to the commerce clause had any merit. In any event, the contention is plainly unsound.

The advertising restrictions of section 3 were adopted by the Oklahoma legislature in furtherance of its public policy, expressed in section 1, that "citizens of the State of Oklahoma shall receive the best possible visual care." In order to protect its citizens from the evils of advertising in this field, the State undertook to suppress the evil wherever it might show up, and, accordingly, it included within the scope of the prohibition the communication media of television, newspaper, radio, etc. That a local newspaper might ultimately be sold in another state, or a television or radio program might also be heard out-of-state was purely incidental. The statutory regulation is essentially and in its overwhelming impact a local regulation; it makes no discrimination in any fashion against interstate trade or commerce, and such incidental effects as it might conceivably have on such trade or commerce, although we know of none, are purely collateral, insignificant, and in

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Stats. Annot. (1946) sec. 148.57 sub. 3; Vernon's Annot. Missouri Stats. (1952) sec. 336.110(1)(5); Rev. Stats. of Nebraska (1943) sec. 71-147, 71-148; Williams Tennessee Code Annot. (1934) sec. 7028; Remington's Rev. Stats. of Washington Annot., sec. 10152(10), (13)-(15).

violation of no known national regulations or policies.[28] If the commerce clause were held to prevent the enactment of the advertising limitations contained in section 3, insofar as radio, television and newspapers are concerned, because the programs might be heard in other states, or the papers sold out-of-state, then the State of Oklahoma would be helpless to control an evil within its own borders. The federal Constitution would become an instrument of destruction for otherwise valid state legislation, and in aid of no national policy or purpose. The advertising restrictions contained in the legislation of all states regulating advertising in the field of visual care, and we have already referred to many such state statutes, would fall as invalid. And the decisions of the state courts upholding the advertising regulations of the various states would, in effect, be overruled. See e.g., cases cited *supra*, pp. 38-40. The

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[28] In the court below, plaintiffs relied on *Lorain Journal Co.* v. *United States*, 342 U. S. 143, for the proposition that local advertising by means of newspapers, etc. constituted "an inseparable part of the flow of the interstate commerce." Of course, the Court in the *Lorain Journal* case was concerned only with the dissemination locally "of news of out-of-state events transmitted to Lorain for immediate dissemination and of advertising of out-of-state products for sale in Lorain." 342 U. S. at 150-151. The Court specifically did not pass on the question whether "the out-of-state distribution of some copies of the Journal, coupled with the considerable interstate commerce engaged in by its publisher in the purchase of its operating supplies, provided * * * a sufficient basis for classifying the publisher's entire operation as one in interstate commerce." 342 U. S. at 150. That is the only possibility of interstate commerce here, and the *Lorain Journal* decision, therefore, is in no way relevant. Further, it cannot be contended that the inclusion or exclusion of plaintiffs' advertisements has any effect whatsoever on the interstate distribution of any newspapers published in Oklahoma or on the extent of out-of-state transmission of a radio or television program. If it be suggested that the restrictions of section 3 might result in some person out of the State of Oklahoma not coming into the State of Oklahoma to purchase his glasses, the short answer is that such a sale as is thereby lost is an Oklahoma sale and not an interstate transaction. Moreover, the mere making of the suggestion illustrates how really minimal is the out-of-state effect of section 3.

Oregon legislation involved in this Court's decision in the *Semler* case, 294 U. S. 608, was not limited to advertising in completely local media. Indeed, the plaintiff in that case advertised in newspapers and periodicals. A decision sustaining plaintiffs' contention here on the interstate commerce issue would, in effect, overrule *Semler*.[29]

But the decisions of this Court make it abundantly clear that the commerce clause is no bar to the enactment of section 3. In *Breard* v. *Alexandria*, 341 U. S. 622, this Court sustained, against a contention based on the interstate commerce clause, the validity of an ordinance of a Louisiana municipality making unlawful the practice of door-to-door soliciting of orders for the sale of goods, as applied to a representative of a Pennsylvania corporation soliciting subscriptions for nationally known magazines. In *Parker* v. *Brown*, 317 U. S. 341, California legislation authorizing programs imposing restrictions upon the sale of raisins by producers to processors was sustained even though ninety-five percent of the raisin crop found its way into interstate commerce. In *South Carolina State Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, this Court sustained state legislation regulating the weight of trucks on its highways, applicable equally to vehicles moving in interstate as well as in intrastate commerce. And in *Railway Express Agency* v. *New York*, 336 U. S. 106, this Court upheld an ordinance of the City of New York which prohibited the operation of advertising trucks on the city streets, even those "engaged in delivering goods in interstate commerce from New Jersey to New York." 336 U. S. at 111. See also *Packer Corp.* v. *Utah*, 285 U. S. 105. The rationale of these cases was aptly set forth by Mr. Chief Justice Stone in *Parker* v. *Brown*, *supra*, at 362-363:

> * * * When Congress has not exerted its power under the Commerce Clause, and state regulation of matters

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[29] Such a decision would logically not be limited to the field of optometry and visual care. All state restrictions on newspaper and radio advertising in all professions would be placed in jeopardy.

> of local concern is so related to interstate commerce, that it also operates as a regulation of that commerce, the reconciliation of the power thus granted with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved. * * *
>
> Such regulations by the state are to be sustained, not because they are "indirect" rather than "direct," * * * not because they control interstate activities in such a manner as only to affect the commerce rather than to command its operations. But they are to be upheld because upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health, and well-being of local communities, and which, because of its local character and the practical difficulties involved, may never be adequately dealt with by Congress. Because of its local character also there may be wide scope for local regulation without substantially impairing the national interest in the regulation of commerce by a single authority and without materially obstructing the free flow of commerce, which were the principal objects sought to be secured by the Commerce Clause.

We have found no federal case, and plaintiffs cite none, which in any way lends support to the contention that section 3 violates the commerce clause of the Constitution.[30] Indeed, the cases are clearly to the contrary.

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[30] The Utah decision relied on by plaintiffs (*State* v. *Salt Lake Tribune Publishing Co.*, 68 Utah, 187, 249 Pac. 474) is not in accord with the constitutional principles enunciated by the foregoing decisions of this Court, and, in any event, the decision is not in point here. In that case, the advertisement was itself an interstate advertisement and not a local one such as in this case. Plaintiffs in this case assert no interstate advertisements which the statute prevents them from purchasing. See *Packer Corp.* v. *Utah*, 285 U. S. 105, 112 ("Whatever may be the limitations upon the power of the state to regulate solicitation and advertisement incident to an exclusively interstate business, the commerce clause interposes no barrier to its effective control of advertising essentially local.")

III

The Challenged Provisions of Section 4 of the Oklahoma Act Do Not Offend Any Provision of the Federal Constitution

The court below held invalid that portion of section 4 of the Oklahoma Act which provides that "No person, firm, or corporation engaged in the business of retailing merchandise to the general public shall rent space, sublease departments, or otherwise permit any person purporting to do eye examination or visual care to occupy space in such retail store." The court, assuming that the sole purpose of the provision was to prohibit corporate practice in the professions of optometry and ophthalmology, found that the provision "was not reasonably adapted to the accomplishment of the end sought," was "arbitrary and oppressive," and constituted an "arbitrary interference with the right of contract." (R. 59, 60). While we need not repeat here in any detail that, in so holding, the court violated the well-settled applicable principles of judicial review, we must emphasize that the court, in our opinion, struck down section 4 solely because it "disagree(d) with the desirability of the legislation," (*Daniel* v. *Family Security Life Insurance Co.*, 336 U. S. 220, 224) and for no other conceivable reason. The court below should not have failed, as we think it did, to discover the very real and close relationship of the provisions of section 4 here involved to the public health and welfare of the people of the State of Oklahoma, and the complete absence of arbitrariness or oppressiveness in their enactment. As Judge Murrah stated in his dissent, it is the court's judgment itself which "is an unwarranted interference with the police power of the state over a subject with which the state is fully competent to deal." (R. 67).[31]

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[31] Judge Murrah appropriately stated further: "In cases of this kind we ought to keep in mind the extremely limited restrictions that the due process clause of the Fourteenth Amendment places upon the state; and that the federal courts should negatively inject themselves into the policy making powers of the state only in the presence of a palpable abuse of the due process clause of the constitution." R. 68.

Section 4 of the Oklahoma Act includes much more than the particular provision with which we are here concerned. Section 4 prohibits optometrists and physicians from receiving rebates or kick-backs from optical companies or from any person, firm, or corporation dealing in optical goods or appliances. It prohibits optometrists and physicians from permitting any person engaged in or interested in the sale of optical goods to solicit business for them. It prohibits optometrists and physicians from making an eye examination or doing visual correction as an employee of any person, firm, corporation, lay body, organization, or group. Likewise it makes it unlawful for any corporation, lay body, organization, group or lay person to make an eye examination or perform any visual correction by means of engaging on a salary, commission or any other compensatory basis the services of a licensed optometrist or physician. And finally, section 4 contains the provision with which we are now concerned.

It is at once apparent that in section 4, the Oklahoma legislature was providing statutory safeguards, in addition to those set forth in the Oklahoma Optometry Act (Oklahoma Stats. Annot. Title 59, secs. 581, et seq.) to assure that the visual care professions in the State of Oklahoma would be practiced on a highly ethical and professional level, and would be free, to as great an extent as possible, from all taints of commercialism. That such legislation is within the constitutional authority of the state to enact and does not unconstitutionally interfere with any contractual rights would seem to have been settled by the decisions of this Court a long time ago. See *Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608, 610-613; *Roschen* v. *Ward*, 279 U. S. 337; *State Board of Dental Examiners* v. *Miller*, 90 Colo. 193, 8 P. (2d) 699, appeal dismissed 287 U. S. 563; *Hayman* v. *Galveston*, 273 U. S. 414; *McNoughton* v. *Johnson*, 242 U. S. 344.

This Court has held, with respect to the practice of a profession, "that the State may deny to corporations the

right to practice, insisting on personal obligations of individuals." *Semler* v. *Oregon State Board of Dental Examiners, supra,* at 611; see also *State Dental Examiners* v. *Miller, supra.* And while the court below conceded such authority in the state, it held that the mere fact that illegal corporate practice has taken place, in some instances, where corporations subleased space to professional eye examiners, "the correlation between the evil sought to be prevented and the one circumstance singled out and prohibited is not sufficient to authorize such a police power regulation". (R. 59). "Whether a professional man indulges in corporate practice, in violation of a statutory prohibition, is a matter of his individual integrity rather than his geographic location." (R. 60).[32]

It is difficult to rationalize this conclusion of the court below. It cited, with apparent approval, and quoted from *Sears Roebuck & Company* v. *State Board of Optometry,* 213 Miss. 710, 57 So. (2d) 726 and *Neill* v. *Gimbel Bros., Inc.,* 330 Pa. 213, 199 A. 178, cases which aptly illustrate the extreme efforts made by department stores and mercantile establishments to evade the corporate practice prohibitions of the various state statutes through various kinds of leasing arrangements made with registered optometrists and physicians. See also *State ex rel Beck* v. *Goldman Jewelry Co.,* 142 Kan. 881, 51 P. (2d) 995; *Ritholz* v. *Arkansas State Board,* 206 Ark. 671, 177 S. W. (2d) 410; *State ex rel Bricker* v. *Buhl Optical Co.,* 131 Ohio St. 217, 2 N. E. (2d) 601; *Rowe* v. *Standard Drug Co.,* 132 Ohio St. 629, 9 N. E. (2d) 609; *State* v. *Kindy Optical Co.,* 216 Iowa 1157, 248 N. W. 332; *Ritholz* v.

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[32] Of course, the challenged provision of section 4, contrary to the court's assumption, is not limited to corporations. It forbids "any person, firm, or corporation engaged in the business of retailing merchandise" from renting space in such retail store to optometrists or ophthalmologists. We assume that when the court spoke of "corporate practice," it meant practice by a non-professional commercial interest, corporate or otherwise.

Commonwealth of Virginia, 184 Va. 339, 35 S. E. (2d) 210; *State ex rel Loser* v. *National Optical Stores Co.*, 189 Tenn. 344, 225 S. W. (2d) 293; see also Notes, 102 A.L.R. 334 and 128 A.L.R. 585. The court, therefore, was not unaware of either the evils involved in the practice of medicine and optometry by nonprofessional commercial interests through employment of registered optometrists or physicians or of the devious efforts made to evade the statutory restrictions on corporate practice. Nor could the court have been unaware of the enforcement burden placed on the law enforcing officials to assure that an optometrist or ophthalmologist practicing or leasing space in a department store was really not an employee of the company. For a federal court, in the circumstances, to say that a state legislature could not constitutionally find that the leasing provision of section 4 would "tend to diminish an evil" (*Roschen* v. *Ward*, 279 U. S. 337, 339) inherent in the practice of the visual care professions by nonprofessional commercial interests through the device of hiring a licensed optometrist or physician "take(s) a degree of omniscience which" we believe the court lacked. *Railway Express Agency* v. *New York*, 336 U. S. 106, 110.

It seems abundantly clear to the point of being obvious that to forbid retail merchandising establishments from making space in their stores available to licensed optometrists or physicians, either by lease or otherwise, almost necessarily results in diminished interest and effort by those mercantile interests to engage in the illicit business arrangement. It is almost certain that the owners of retail merchandise stores would have very little interest in establishing Dr. Smith in a professional office of his own, disassociated from their commercial enterprise. Similarly, Dr. Smith would have very little interest in such an arrangement. Contrary to what the court below said, the "geographic location" is all important. In any event, the

Oklahoma legislature could reasonably so conclude.[33] The fact that some leasing arrangements would fall which did not involve illegal practice by commercial interests is, of course, immaterial. *Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608, 613. The court's assertion about "individual integrity" being the important factor in whether a person would engage in an unlawful enterprise is a gratuitous assertion entirely beside the point. On that basis, no regulatory laws of any kind are required, because people of "individual integrity" will do no wrong.

Moreover, the provision of section 4 here involved has a very real purpose quite apart from its effect in preventing illegal commercial practice. It is intended to do just what it says and that is to keep the practice of optometry and ophthalmology out of retail merchandise stores and in private professional offices where they belong. A state has an interest in seeing that a profession practiced within its borders is practiced in a professional atmosphere. Cf. *Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608, 612. It can require that optometry and medicine not be practiced from door-to-door or outside of an office or fixed place of business. *Harris* v. *State Board of Optometrical Examiners*, 287 Pa. 531, 135 Atl. 237; *Saunders* v. *Swann*, 155 Tenn. 310, 292 S. W. 458; see also *City of Springfield* v. *Hurst*, 144 Ohio St. 49, 56 N. E. (2d) 185; *Baccus* v. *Louisiana*, 232 U. S. 334. That being so, it certainly can require that

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[33] As the cases cited show, a mere prohibition of corporate practice without more, is not sufficient to prevent all sorts of attempts at evasion by sham leasing and fee arrangements, with the result that each time an optometrist or physician is found practicing in a retail mercantile establishment, state law enforcing officials are called upon to make detailed investigations and then to engage in litigation through the highest courts of the state in order to prevent evasion of the law. The elimination of this administrative and enforcement difficulty, by an absolute prohibition of the practice of optometry and medicine in mercantile stores, is alone sufficient justification for the enactment of the challenged provision.

optometry and ophthalmology not be practiced in the middle of a department store. The public is attracted into a department store or other retail merchandise establishment for a variety of reasons. An attractive advertisement, a special bargain sale, the need for an article of clothing, or the mere desire to go shopping, may attract an individual into a store. But no one of these reasons should be the occasion for a professional eye examination. It cannot be doubted that the presence of an optometrical or ophthalmological department in a retail establishment would tend to induce many people who had entered the store for wholly different and unrelated purposes to have their eyes examined there.[34] The uncontrolled advertising and commercialization of the market place would, in a substantial degree, intrude into the visual care profession, evils which the state, if it so desires, should certainly be free to exclude.[35]

It cannot validly be suggested that there is no evil in these arrangements because they result in a person having his eyes examined when he might not otherwise have done so, and the examination is made by a professional optometrist or physician. To be sure, there is much good

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[34] While it is true that an office on the ground floor of a building on a downtown street might also attract some people passing by, the difference is apparent. A person already in a store is much more susceptible than a person outside on his way elsewhere. Moreover, we know of no reason why professional optometrists or physicians cannot be required to practice in office buildings. That Oklahoma has not seen fit to do so, of course, does not make the present regulation invalid.

[35] Judge Murrah, in his dissent, (R. 66-68) vividly points out the evils, in this very case, which the decision of the court below permits to continue. It is interesting to note that Dr. Rips, a licensed physician (not an optometrist), entered into his lease arrangement with Zales Jewelry Company on June 17, 1953, only three days before the Governor of Oklahoma approved the legislation here under consideration (R. 5). The complaint, filed on September 2, 1953, one day before the effective date of the legislation (R. 3, 5) alleges the value of the lease to Dr. Rips to be "at least $10,000" (R. 12). At the trial, Dr. Rips testified that the lease from Zales Jewelry was worth $25,000. (R. 200).

to be gained in periodic eye examinations, just as there is much good to be gained in periodic medical examinations. But that is not the point. In spite of that good, it is concededly an evil that professional services be obtained as a result of advertising, and the state, concededly, can prevent that from happening. So, too, is it an evil that professional services be obtained as a mere incident to a downtown shopping trip to a department store. The evil does not lie in the fact that an examination was had, but in the fact that the particular optometrist or physician was consulted, not because of any particular professional skill, but because he happened to be located in the middle of a retail commercial establishment. Such reasons for the development of a professional practice inevitably "tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous" (*Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608, 612.) Practitioners, in the long run, would be more concerned in "setting up shop" in the right "spot" than in developing their professional skills and proficiency. The end result is incompetency in the professional service and lack of ethics in the profession. This the state can protect against. *Dent* v. *West Virginia*, 129 U. S. 114, 122.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the court below holding certain portions of Oklahoma Enrolled House Bill No. 953 (Okla. Stats. Annot., Title 59, secs. 941-947) unconstitutional should be reversed.

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APPENDIX

The relevant provisions of Oklahoma Enrolled House Bill No. 953 (Okla. Stats. Ann., Title 59, §§ 941-947) are as follows:

SECTION 1. It is the public policy of the State of Oklahoma that the citizens of Oklahoma shall receive the best possible visual care, through the efforts of well trained and qualified physicians licensed under Chapter 11, Title 59, Oklahoma Statutes and optometrists licensed under Chapter 13, of Title 59, Oklahoma Statutes and that no unqualified person shall be permitted to visually correct for compensation the eyes of another.

SECTION 2. It shall be unlawful for any person, firm, corporation, company, or partnership not licensed under the provisions of Chapter 11 or Chapter 13 of Title 59, Oklahoma Statutes 1951, to fit, adjust, adapt, or to in any manner apply lenses, frames, prisms, or any other optical appliances to the face of a person, or to duplicate or attempt to duplicate, or to place or replace into the frames, any lenses or other optical appliances which have been prescribed, fitted or adjusted for visual correction, or which are intended to aid human vision or to give any treatment or training designed to aid human vision, or to represent or hold himself out to the public as being qualified to do any of the acts listed in this Section, except that persons licensed under the provisions of Chapters 11 or 13 of Title 59, Oklahoma Statutes 1951 may in a written prescription, or its duplicate, authorize any optical supplier to interpret such prescription, and who in accordance therewith may measure, adapt, fit, prepare, dispense, or adjust such lenses, spectacles, eye glasses, prisms, tinted lenses, frames, or appurtenances thereto, to the human face for the aid or correction of visual or ocular anomalies of the human eye; and may continue to do the said acts on the aforesaid written prescription, or its duplicate, provided however, that the physician or optometrist writing such prescription shall remain responsible for the full effect of the appliances so furnished by such other person. Provided that this Sec-

tion shall not prevent a qualified person from making repairs to eye glasses.

SECTION 3. It shall be unlawful for any person, firm, company, corporation or partnership to solicit the sale of spectacles, eye glasses, lenses, frames, mountings, prisms or any other optical appliances or devices, eye examinations or visual services, by radio, window display, television, telephone directory display advertisement, or by any other means of advertisement; or to use any other method or means of baiting, persuading, or enticing the public into buying spectacles, eye glasses, lenses, frames, mountings, prisms, or other optical appliances for visual correction. Provided, however, that the provisions of this Act shall not render any newspaper or other advertising media liable for publishing any advertising furnished them by a vandor of said commodity or material; nor shall anything in this Act prevent ethical education publicity or advertising by legally qualified health groups that does not violate presently existing laws of Oklahoma, nor prevent the proper use of ethical, professional notices. Nothing in this Act shall prohibit the sale of ready-to-wear glasses equipped with convexspherical lenses nor sunglasses equipped with plano lenses nor industrial glasses and goggles with plano lenses used for industrial eye protection when sold as merchandise at any established places of business and where the selection of the glasses is at the discretion of the purchaser.

SECTION 4. It shall be unlawful for any optometrist, physician or other person doing, or purporting or pretending to do eye examination or visual correction to receive or accept any rebate, kick-back, reward or premium from any optical company or any other person, firm or corporation dealing in optical goods, appliances or materials, or knowingly allow or permit any person engaged in or interested in the sale of such optical goods, appliances, or materials, to solicit business for any person licensed under the provisions of Chapters 11 or 13 of Title 59, Oklahoma Statutes. It shall be unlawful for any optometrist, physician, or other person to make an eye examination, or do visual correction in any manner, either directly or indirectly as an employee or associate of

a person, firm, corporation, lay body, organization, group or lay person and it shall be likewise unlawful for any corporation, lay body, organization, group or lay person in any manner to make an eye examination or perform any visual correction through the means of engaging the services on a salary, commission or any other compensatory basis of a person licensed under the provisions of Chapters 11 or 13 of Title 59, Oklahoma Statutes 1951, provided that this sentence shall not apply to the University of Oklahoma School of Medicine and Hospitals, or to a bona fide resident physician of a licensed hospital. No person, firm or corporation engaged in the business of retailing merchandise to the general public shall rent space, sublease departments, or otherwise permit any person purporting to do eye examination or visual care to occupy space in such retail store. Nothing in this Section shall prohibit a person licensed under Chapter 11 or Chapter 13 of Title 59, Oklahoma Statutes, from organizing or maintaining a professional association with other persons so licensed.

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SECTION 6. Any person, firm company, corporation, or partnership violating any of the provisions of this Act shal be guilty of a misdemeanor and upon conviction thereof shall be punished for each such offense, as provided by law, and in addition thereto may be enjoined by a Court of competent jurisdiction for any further violations of the provisions of this Act. It shall be the mandatory duty of the county attorneys of the respective counties to bring such injunction suits when a verified complaint is filed with such county attorney alleging any violations of this Act. This Act shall not supersede other laws, but shall be cumulative to other statutes of the State of Oklahoma.

SECTION 7. If any of the provisions of this Act shall be held by a Court of competent jurisdiction to be inapplicable to a specific person or set of circumstances, the same shall not affect the validity of this Act in regard to other persons or circumstances.

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